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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 335

ASHTON POWER WRECKER EQUIPMENT COMPANY, INC., A MICHIGAN CORPORATION,
Plaintiff-Appellant,

vs.

THE STATE OF MICHIGAN AND THE DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN,
Defendant-Appellee

STATEMENT AS TO JURISDICTION

This is an appeal brought under 28 USC, Sec. 1257, from a final judgment of the Supreme Court of the State of Michigan entered April 7, 1952. Briefly the facts are as follows:

Plaintiff-appellant is engaged in the business of the manufacture and installation of truck equipment in the City of Detroit, Wayne County, Michigan, and sells this equipment, so far as the sales in this case are concerned, through interstate direct mail advertising and periodical advertising, negotiating the terms thereof through interstate communication and receiving orders through interstate communication, and finally mounting the equipment upon truck chassis

belonging to non-resident purchasers with the intention on the part of the purchasers to immediately remove the equipment from the State of Michigan after purchase, and use it outside thereof.

A deficiency assessment was levied against the plaintiff-appellant by defendant-appellee, State of Michigan, for unpaid sales taxes and thereafter plaintiff-appellant paid the sales taxes under protest and brought suit to recover the amount paid. Plaintiff-appellant was awarded a judgment against the State of Michigan in the Circuit Court for the County of Wayne, State of Michigan, on February 13, 1951, which judgment was appealed by defendant-appellee to the Supreme Court of the State of Michigan, and on April 7, 1952, the judgment of the lower court was reversed and a judgment entered of no cause of action. Inasmuch as this case involves the validity of a state statute, the validity of which has been upheld by the highest appellate court of the State of Michigan, plaintiff-appellant is entitled to file Petition for Leave to Appeal the judgment of the Supreme Court of the State of Michigan to the Supreme Court of the United States. 28 U. S. C., Sec. 1257. *Flournoy* v. *Wiener*, 321 U. S. 253, 88 L. Ed. 708, 64 S. Ct. 548; *Matton S. B. Co.* v. *Murphy*, 319 U. S. 412, 87 L. Ed. 1483, 63 S. Ct. 1126; *Colorado Nat. Bank* v. *Bedford*, 310 U. S. 41, 84 L. Ed. 1067, 60 S. Ct. 800; *Great Northern R. Co.* v. *Washington*, 300 U. S. 154, 81 L. Ed. 573, 57 S. Ct. 397; *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85, 77 L. Ed. 1047, 52 S. Ct. 529.

The Michigan Statute involved is the so-called Sales Tax Act, being Act No. 167 of the Public Acts of 1933, as amended. The provisions thereof which are in dispute are set out in full below, the section numbers used being those of the Michigan Statutes Annotated and Compiled Laws of the State of Michigan, 1948.

> Section 1. (g) "The term 'gross proceeds' means the amount received in money, credits, property or

other money's worth in consideration of sales at retail within this state, etc." M. S. A. 7.521(h), C. L. 1948, 205.51(h).

Section 1. (b) "The term 'sale at retail' means any transaction by which is transferred for consideration, the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, etc." M. S. A. 7.521(b), C. L. 1948, 205.51(b).

Section 2 provides as follows:

> "There is hereby levied upon and there shall be collected from all persons engaged in the business of making sales at retail as hereinbefore defined, an annual tax for the privilege of engaging in such business equal to three (3) per cent of the gross proceeds thereof." M. S. A. 7.522, C. L. 1948, 205.52.

Plaintiff-appellant has consistently contended, before the Department of Revenue of the State of Michigan, the Circuit Court for the County of Wayne, State of Michigan, and the Supreme Court of the State of Michigan, that the sales tax as applied in this case, as levied against interstate commerce, constituted an undue burden on interstate commerce and was therefore unlawful. Arguments as to this Statute being contrary to the Commerce Clause of the United States Constitution, being Article I, Section 8(3), were presented to the Department of Revenue of the State of Michigan, the Circuit Court for the County of Wayne, State of Michigan, and the Supreme Court of the State of Michigan.

The Supreme Court of the State of Michigan on Page 6 of its opinion stated as follows:

> "In the matter before us both title and possession of the wrecker equipment passed to the purchasers in Michigan. The installation of the equipment was per-

formed within Michigan; material was furnished within Michigan for use on property belonging to parties outside the State of Michigan; and these transactions, although initiated through channels of interstate commerce, were wholly completed within the State of Michigan. These are sufficient local activities upon which to predicate a Michigan sales tax. The interstate aspects of the transactions are only incidental. The fact that other states may impose a use tax upon the same property is immaterial to decision in the instant case."

The federal question presented to the Supreme Court of the State of Michigan was the validity of the said so-called Sales Tax Act, being Act No. 167 of the Public Acts of 1933 as amended. In view of the limitations of the so-called Commerce Clause of the United States Constitution, being Article I, Section 8(3) thereof, it is the plaintiff-appellant's contention that the taxes levied by said so-called Sales Tax Act fall so directly upon interstate commerce as to constitute an undue burden thereon and that this is particularly true in view of the fact that the same transaction is subject to a Use Tax in the State of Ohio and other states, (See Page's Ohio General Code, Section 5546-26, being the Use Tax Statute of the State of Ohio; Code of Alabama Title 51, Section 787 to 811, being the Use Tax Statute of the State of Alabama; Deering's California Codes, Sections 6201 to 6264 inclusive, being the Use Tax Statute of the State of California; and Code of Iowa for 1950 Section 423, being the Use Tax Statute of the State of Iowa) which use taxes are designed to be complementary to the local sales tax, apply only to interstate transactions, allow no exemption for sales tax paid other than the local sales tax, and which in effect, together with the Michigan Sales Tax, levy two taxes upon a transaction because of its interstate character, which transaction,

if it had been intrastate in nature, would have borne one tax only.

The theory behind the Use Tax was very aptly expressed in the case of *Chicago Bridge & Iron Co.* v. *Johnson*, 19 Cal. 2nd 162, 119 Pacific 2nd 945, in which the Court said:

> "The tax as applied in the instant case does not discriminate against interstate commerce, or constitute a prohibited regulation or interference therewith. As we have seen, it is complemental to the sales tax, and the two give a complete, uniform and equal coverage which, rather than discriminating against interstate commerce, endeavors to place intrastate commerce on a fair and equal basis therewith. The tax is not a regulation of interstate commerce, although it may incidentally affect it. It is merely a tax occurring in this state which does not burden interstate commerce nor place it at a disadvantage."

See also *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 85 L. Ed. 888, 61 S. Ct. 586, 132 ALR 475.

On the other hand, in such cases as that of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 303, 85 L. Ed. 565, 50 S. Ct. 388, 128 ALR 876; *Department of Treasury of the State of Indiana et al.* v. *Wood Preserving Corporation*, 313 U.S. 62, 85 L. Ed. 1188, 61 S. Ct. 885; and *Superior Oil Co.* v. *State of Mississippi ex rel. Rush H. Knox*, 280 U.S. 390, 74 L. Ed. 504, 50 S. Ct. 169, various sales taxes have been upheld on the theory that there was sufficient local activity to sustain such a tax.

The line of decisions which we find in the sales tax cases and the line of decisions which we find in the use tax cases must necessarily have led sooner or later to the situation with which we are now faced in this case, to-wit, an apparently valid sales tax levied on a transaction because, as the Michigan Supreme Court said, there is sufficient local activity to justify such a tax, and at the same time an appar-

ently valid use tax levied upon the same transaction, which use tax is specifically directed against interstate commerce, and which use tax was designed not as a uniform tax but as complemental tax to the Ohio State Sales Tax or other state sales tax.

The overall result of which is that we have an interstate transaction burdened by two taxes, which transaction if it had been carried on solely within the State of Michigan or the State of Ohio or any other state would have been subject to only one tax. If there is anything left in the theory that interstate commerce may not be burdened unduly by the taxation of local governments, then indeed the plaintiff-appellant is entitled to relief in this Court.

In the leading case of *McGoldrick* v. *Berwind-White Coal Mining Co., supra*, although the sales tax there was held to be valid, the Court supported the foregoing proposition and said:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidding regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

To our knowledge the question has never before been presented to the United States Supreme Court in the form raised by the facts of this case, and unless the United States

Supreme Court will take cognizance of the effect of both of these taxes upon this interstate transaction, both of which have been approved as individually applied to interstate commerce, then indeed there can be no relief and interstate commerce as we know it today can be and will be subject to multiple taxation by virtue only of the fact that it constitutes an interstate transaction.

As we have found no cases exactly like this one, a trite recitation of the many decisions on this subject would seem useless. Each case must stand or fall on its own merits, as the Court said in *Nelson* v. *Sears, Roebuck & Co., supra.*

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem."

As both the Michigan Sales Tax and Ohio and other Use Taxes have been valid when individually applied, we believe both taxes and in this case the Michigan Sales Tax should be struck down as an undue burden on interstate commerce.

FREDERIC T. HARWARD of Detroit, Michigan,
and McINERNEY & SWABY of
Wyandotte, Michigan,
Attorneys for Plaintiff-Appellant.

By FREDERIC T. HARWARD.

Dated: June 30, 1952

APPENDIX "A"

STATE OF MICHIGAN SUPREME COURT

ASHTON POWER WRECKER EQUIPMENT COMPANY, a Michigan Corporation, *Plaintiff-Appellee,*

v.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE, Louis M. Nims, Commissioner of Revenue, Tussing Building, Lansing, Michigan, *Defendants-Appellants*

OPINION—Filed March 6, 1952

Before the Entire Bench

BUSHNELL, *J.:*

Plaintiff Ashton Power Wrecker Equipment Company, a Michigan corporation, is engaged in the business of installing wrecker equipment and bodies on automobile trucks furnished by and belonging to purchasers of the equipment or bodies. Ashton secures a part of its business from customers outside the State of Michigan through advertisements in trade papers or by direct mail solicitation. It also receives orders through mails and by telephone and telegraph across State lines. Truck chassis belonging to out-of-state customers are brought to plaintiff's place of business in Detroit, where wrecker equipment is installed, and the trucks are then immediacly returned to the customer.

Ashton contends that such transactions are purely interstate in nature and that it is not liable for the payment of a Michigan sales tax upon this portion of its sales. Defendant Department of Revenue, however, under the General Sales Tax act (Act No. 167, Pub. Acts 1933, as amended, CL 1948, § 205.51-78 [Stat. Ann. § 7.521-49]) levied a deficiency assessment on such transactions in the sum of $4,119.76 and interest thereon of $327.92. This tax was paid by Ashton under protest and suit was brought for its recovery.

The trial judge held that the decision in Montgomery Ward & Co., Inc., v. Fry, 277 Mich. 260, was controlling, and

that "the whole course of procedure indicated that the matter in contemplation of the parties was one which consisted purely and simply of commercial intercourse across a state line." The trial judge further found:

"The very act of driving a truck across state lines for the purpose amounted to an act of commercial communication. When the truck reached the City of Detroit, it went into the plaintiff's plant, and there had the equipment installed upon it, with the express understanding on both sides that the truck and the equipment were immediately to be taken out of the State of Michigan and back into the state of the owner. It is therefore perfectly plain that it was within the contemplation of the parties at all times that this entire transaction consisted of elements of transmission of information back and forth across state lines between the parties and an agreement made between them in regard to the doing of work in one state upon a piece of property the situs of which was in another state. It is impossible to conceive how such a transaction can be looked upon as anything except interstate commerce. That is what the parties intended it to be, and that is what it was."

The department of revenue has appealed from a judgment for Ashton in the sum of $4,447.68.

Both parties rely upon J. B. Simpson, Inc., v. O'Hara, 277 Mich. 55, and Montgomery Ward & Co., Inc., v. Fry, 277 Mich. 260.

These cases are related to the one now under consideration only in that the same general problem was presented, namely, under what circumstances are sales sufficiently in interstate commerce to be excluded from the imposition of the State sales tax. The specific questions there involved, however, are unlike that presented here.

In the Simpson case orders for merchandise were given at a branch office in the city of Detroit. These orders were in writing and contained the following conditions:

"This order is subject to acceptance at our main office at Chicago, Illinois, and is not subject to countermand after such acceptance. Merchandise will be shipped from Chi-

cago, Illinois, and *title shall pass to purchaser immediately upon delivery to the carrier.*"

The court held:

"Such a sale is not made in Michigan but in Illinois and being interstate commerce cannot be taxed by the State of Michigan."

In the Montgomery Ward case mail orders were solicited from residents of Michigan by means of printed catalogues. Shipments were made directly from Chicago to the purchasers in Michigan. The sales tax imposed upon such transactions and paid under protest were held to be recoverable because in each instance the entire transaction was wholly within interstate commerce. Another group of transactions differing from the foregoing only in the payment of the purchase price at a Montgomery Ward store in Michigan was also held to be wholly within interstate commerce. The circulation of catalogues, payment of money at retail stores, and the final shipment into Michigan were only incidental to the sales and, therefore, did not constitute sufficient local activities on which to base a Michigan sales tax.

We are not persuaded that the precise question involved in the present appeal has been heretofore determined by us; on the contrary, we feel that it is an open one.

We stated in People v. Bob-Lo Excursion Co., 317 Mich. 686, at page 691:

"Since by the Federal Constitution the power to regulate both foreign and interstate commerce is vested in Congress (United States Constitution, art. 1, § 8) due consideration must be given to pertinent decisions of the Supreme Court of the United States."

The basic philosophy underlying the relationship between State taxation and interstate commerce was stated by Mr. Justice Stone, writing for the Court, in McGoldrick v. Berwind-White Coal Mining Co., 309 US 33 (84 L. ed. 565, 60 S. Ct. 388). He said, among other things:

"It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent

which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. * * *

"Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress.

"* * * courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed."

"The general rule * * * is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." Norton Company v. Department of Revenue of the State of Illinois, —— US —— (95 L. ed. 329, —— S. Ct. ——).

Ashton relies primarily upon the fact that contracts for the sale of wrecker equipment were negotiated through the channels of interstate commerce; and secondly, upon the fact that the property involved in such sales was destined to be immediately transported in interstate commerce. Transactions of a comparable nature have had the attention of the United States Supreme Court in the following cases: Superior Oil Co. v. State of Mississippi ex rel. Rush H. Knox, 280 US 390 (74 L. ed. 504, 50 S. Ct. 169); Western Live Stock v. Bureau of Revenue, 303 US 250 (82 L. ed. 823, 58 S. Ct. 546); McGoldrick v. Berwind-White Coal Mining Co., 309 US 33 (84 L. Ed. 565, 60 S. Ct. 388); Department of Treasury of the State of Indiana et al. v. Wood Preserving Corporation, 313 US 62 (85 L. ed. 1188, 61 S. Ct. 885); Department of Treasury of the State of Indiana et al. v. Ingram-Richardson Mfg. Company of Indiana, 313 US 252 (85 L. ed. 1313, 61 S. Ct. 866); International Harvester Company v. Department of Treasury of the State of Indiana, 322 US 340 (88 L. ed. 1313, 64 S. Ct. 1019); United States of America v. South-Eastern Underwriters Association et al., 322 US 533 (88 L. ed. 1440, 64 S. Ct. 1162).

Through these authorities runs the thread of reasoning that (1) the fact that a sale was negotiated through the channels of intrastate commerce is immaterial; (2) that it is also immaterial that the goods will be transported to points outside the State almost immediately; and (3) that a State sales tax is lawfully imposed if it is conditioned upon a sufficient local activity.

In the matter before us both title and possession of the wrecker equipment passed to the purchasers in Michigan. The installation of the equipment was performed within Michigan; material was furnished within Michigan for use on property belonging to parties outside the State of Michigan; and these transactions, although initiated through channels of interstate commerce, were wholly completed within the State of Michigan. These are sufficient local activities upon which to predicate a Michigan sales tax. The interstate aspects of the transactions are only incidental. The fact that other states may impose a use tax upon the same property is immaterial to decision in the instant case.

For the reasons stated, we must disagree with the trial judge and hold that the sales tax was lawfully imposed in the instant case.

The judgment of the circuit court is vacated and the cause is remanded for the entry of a judgment in favor of the defendant, State of Michigan, Department of Revenue. A question of general public nature being involved, no costs will be allowed.

Signed: George E. Bushnell,
Emerson R. Boyles,
Neil E. Reid,
Edward M. Sharpe,
Leland W. Carr,
John R. Dethmers,
Walter H. North,
Henry M. Butzel

Endorsed: Filed March 6, 1952.
Jay Mertz,
Clerk Supreme Court.

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SEP 15 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 335

ASHTON POWER WRECKER EQUIPMENT COMPANY, A MICHIGAN CORPORATION,
Appellant,

vs.

THE STATE OF MICHIGAN AND THE DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT MAKING AGAINST JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

FRANK G. MILLARD,
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Subdivision (d) 2
Subdivision (e) 2

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 335

ASHTON POWER WRECKER EQUIPMENT COMPANY, A MICHIGAN CORPORATION,

Appellant,

vs.

THE STATE OF MICHIGAN AND THE DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OF APPELLEES MAKING AGAINST JURISDICTION, AND MOTION TO DISMISS OR AFFIRM.

Appellees, believing the matters herein set forth demonstrate a lack of substantial Federal questions duly raised or necessarily decided by the Supreme Court of the State of Michigan, file this statement disclosing matters and grounds making against jurisdiction and respectfully move the Court to dismiss the appeal or affirm the judgment of the court below, on the following grounds:

First: The trial court did not pass upon the validity of

the Michigan General Sales Tax Act,* nor did it hold such statute repugnant to the Commerce Clause of the Constitution of the United States, Article 1, § 8 (3), but, having considered undisputed facts, determined (48) that since Ashton's retail-sales transactions had been in interstate rather than intrastate commerce, they were not subject to levy of the tax imposed by Michigan law. The highest court of the State, upon review of such facts, 332 Mich. 432, held that Ashton's retail sales had been within the State of Michigan and were therefore subject to exaction of the tax aforesaid.[1]

1. The Michigan General Sales Tax Act, § 2, as amended,[2] levies upon, and provides for collection from, all persons engaged in the business of making "sales at retail," an annual tax for the privilege of engaging in such business, equal to 3 per cent of the "gross proceeds" thereof, plus certain prescribed penalties and interest when applicable, less allowable deductions.

The first section thereof defines, among others, the terms "sale at retail," and "gross proceeds," as follows:

> "(b) The term 'sale at retail' means any transaction by which is transferred for consideration any of the incidents of the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use or for any other purpose than for resale in the form of tangible personal property to a person licensed under this act."[3]

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* Mich. Pub. Acts 1933, No. 167, as amended; Mich. Comp. Laws 1948, § 201.51, Mich. Stat. Ann. 1950 Rev. Vol. 6, § 7.521 *et seq.*

[1] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed record in the Michigan Supreme Court.

[2] Mich. Comp. Laws 1948, § 205.52, Mich. Stat. Ann. (Henderson) § 7.522.

[3] Subdivisions (c), (d) and (e) of § 1 of the statute, further define "sale at retail" to include conditional sales, installment lease sales, sales of electricity, natural gas, and other transactions not material here.

"(h) The term 'gross proceeds' means the amount received in money, credits, property or other money's worth in consideration of sales at retail *within this state* (emphasis, ours), without any deduction on account of the cost of the property sold, the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expense whatsoever, nor shall any deduction be allowed for losses. Credits or refunds for returned goods may be deducted."

The highest court of the State has held, *Standard Oil Co.* v. *Michigan*, 283 Mich. 85, this statute exacts a tax for the privilege of engaging in business of selling tangible personal property at retail "within the state." Consequently, the tax could not be exacted from the gross proceeds of an interstate retail sales transaction, for otherwise the statute would be invalid. *J. B. Simpson, Inc.* v. *O'Hara*, 277 Mich. 55, *Montgomery Ward & Co.* v. *Fry*, 277 Mich. 260.

2. On the 3rd day of May, 1950, the appellant, Ashton Power Wrecker Equipment Company, a Michigan corporation having its principal place of business in the city of Detroit (17), instituted an action at law in the circuit court for the county of Wayne against the State of Michigan and her Department of Revenue by filing a declaration (1) to recover the amount of certain sales taxes theretofore paid under written protest (Exhibit A, 8) that the sales transactions upon which such tax had been levied, were in interstate commerce, and that imposition of the tax aforesaid, constituted a burden on the Commerce, contrary to the Constitution of the United States, Article 1, § 8 (3).

Appellant's declaration (1) described (2-4) certain retail sales transactions in which it had engaged, later summarized by the Michigan Supreme Court in its subsequent opinion, 332 Mich. 432, 434, as follows:

"Plaintiff Ashton Power Wrecker Equipment, a Michigan corporation, is engaged in the business of installing

wrecker equipment and bodies on automobile trucks furnished by and belonging to purchasers of the equipment or bodies. Ashton secures a part of its business from customers outside the state of Michigan through advertisements in trade papers or by direct-mail solicitation. It also receives orders through mails and by telephone and telegraph across State lines. Truck chassis belonging to out-of-state customers are brought to plaintiff's place of business in Detroit, where wrecker equipment is installed, and the trucks are then immediately returned to the customer."

The declaration then averred (5):

> "That said statute *was not intended to tax sales such as have been described in this Declaration* and the interpetation placed upon said statutes by the Department of Revenue is beyond the powers of said Department and is in conflict with the intent of the Legislature and that *as a matter of fact* (emphasis, ours), said aforementioned sales were not sales within the State of Michigan." (Emphasis supplied)

The only hint of a claim that the Act in question might possibly be deemed to violate the Commerce Clause, is found in the following allegation of the declaration (5-6):

> "10. If it should be determined, however, that the aforementioned sales were sales within the State of Michigan within the meaning of said statute, then said statute is contrary to the Constitution of the United States, Section 8 (3) Article 1 thereof in that it places a burden upon interstate commerce and is unconstitutional to the extent that it does so."

3. The cause having been submitted on a stipulation of facts (17) as well as upon testimony duly taken (20-47), the trial judge, in a written opinion (48), held, in substance and effect, that Ashton's retail-sales transactions were in interstate commerce and not within the state, and since levy of

the sales tax imposed a burden on the Commerce, the amount paid thereon could be recovered by appellant, and on the 13th day of February, 1951, he entered judgment (52) accordingly.

Appellees duly appealed (54) from the judgment, and assigned reasons and grounds therefor (58). On the 6th day of March, 1952, the Supreme Court of the State of Michigan handed down an opinion, 332 Mich. 432, holding in effect that the tax imposed was conditioned upon a sufficient local activity, id., p. 438:

> "In the matter before us both title and possession of the wrecker equipment passed to the purchasers in Michigan. The installation of the equipment was performed within Michigan; material was furnished within Michigan for use on property belonging to parties outside the State of Michigan; and these transactions, although initiated through channels of interstate commerce, were wholly completed within the State of Michigan. These are sufficient local activities upon which to predicate a Michigan sales tax. The interstate aspects of the transactions are only incidental. The fact that other States may impose a use tax upon the same property is immaterial to decision in the instant case.
>
> For the reasons stated, we must disagree with the trial judge and hold that the sales tax was lawfully imposed in the instant case."

The judgment of the circuit court was vacated March 6, 1952 and the cause was remanded for the entry of a judgment in favor of the defendant, State of Michigan, Department of Revenue, 332 Mich. at 438.

Petition for appeal to this Court was received July 3, 1952, and an order allowing appeal was entered by Mr. Justice Reed, July 5, 1952.

It is therefore respectfully suggested, in view of the fore-

going, that this Court should refuse to note probable jurisdiction because

(a) the state statute presently assailed, provides in §§ 1 and 2 thereof that the tax imposed for the privilege of engaging in the business of making sales at retail, shall be equal to 3% of the gross amount received "in consideration of sales at retail *within this State*" (emphasis, ours), thereby excluding purely interstate retail sales from the computation;

(b) therefore, the precise question presented to the courts of Michigan in this cause was, whether as a matter of fact, certain business transactions conducted by Ashton, were sales at retail within the state of Michigan; if such sales at retail were, in the language of the statute, "within this State," they, as a matter of law, came within reach of the Act and consequently were subject to the sales tax imposed thereby; if such sales were in interstate commerce and not "within this State," they could not be taxed under the Act; in short, the Act itself supplies the sole test to be applied;

(c) since these provisons of the Michigan General Sales Tax Act, are couched in plain and unambiguous terms, it follows that the highest court of the State decided no question of statutory construction; much less did either Michigan court, trial or appellate, decide a question involving the validity of the Act here challenged, as tested by the Commerce Clause of the Federal Constitution; and, finally, summing it all up, it cannot be said that in this cause there was drawn in question the validity of a state statute, or that the decision of the court below was in favor of such validity, or that the highest court of the State decided that the Michigan General Sales Tax Act, did not violate the Commerce Clause; that question, we respectfully sub-

mit, was never reached by the courts of Michigan in the cause at bar.

Second. We respectfully submit the court below was correct in deciding that the sales at retail involved in litigation, although initiated through channels of interstate commerce, were wholly completed within the State of Michigan, and that there were sufficient local activities upon which to predicate a Michigan sales tax. This decision was based in large part upon the following authorities:

Superior Oil Co. v. *State of Mississippi*, 280 U. S. 390;
Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250;
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33;
Department of Treasury of Indiana v. *Wood Preserving Corporation*, 313 U. S. 62;
International Harvester Co. v. *Department of Treasury*, 322 U. S. 340;
Department of Treasury of Indiana v. *Ingram-Richardson Manufacturing Co.*, 313 U. S. 252;
United States v. *Southeastern Underwriters Association*, 322 U. S. 533.

From the foregoing decisions of this Court, the following conclusion was drawn:

> "Throughout these authorities runs the thread of reasoning that (1) the fact that a sale was negotiated through the channels of interstate commerce is immaterial; (2) that it is also immaterial that the goods will be transported to points outside the State almost immediately; and (3) that a State sales tax is lawfully imposed if it is conditioned upon a sufficient local activity."

So far, therefore, as the merits of this cause are concerned, we stand upon the opinion of the court below, 332 Mich. 432.

Third: While we regret the necessity, and do so with great reluctance, it becomes our duty to invite the Court's attention to the following:

The appeal allowed in this cause is from a final judgment of the Supreme Court of the State of Michigan, 332 Mich. 432, vacating the judgment of the circuit court and remanding the cause for the entry of a judgment in favor of the defendant, State of Michigan, department of revenue.

In appellant's petition for appeal addressed to Mr. Justice Reed, it is alleged:

> "An appeal from said judgment (of the circuit court) to the Supreme Court of the State of Michigan was taken by the defendant-appellee and the judgment of the lower court was reversed and a judgment in favor of the defendant-appellee entered April 7, 1952."

The trouble is that the final judgment of the Supreme Court of the State of Michigan, from which an appeal has been taken to this Court, was entered on the 6th day of March, 1952. The petition for appeal therefrom was not filed until the 3rd day of July, 1952. The judgment to which counsel refer, was entered in the circuit court for the county of Wayne on the 7th day of April, 1952, after the cause had been remanded, and, of course, no appeal would lie therefrom to this Court.

Since we seek no advantage from a mere technicality, if such it be, we are content merely to call attention to the course of procedure followed in this cause.

WHEREFORE, the appellees respectfully submit this statement disclosing the foregoing matters and grounds making

against the jurisdiction of this Court, together with their motion to dismiss or affirm.

Respectfully submitted,

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EDMUND E. SHEPHERD,
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(3897)